



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF P-T-G-, INC.

DATE: MAY 10, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, an information technology consulting firm, seeks to temporarily employ the Beneficiary as a “programmer analyst” under the H-1B nonimmigrant classification for specialty occupations. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The H-1B program allows a U.S. employer to temporarily employ a qualified foreign worker in a position that requires both (a) the theoretical and practical application of a body of highly specialized knowledge and (b) the attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum prerequisite for entry into the position.

The Director, California Service Center, denied the petition. The Director concluded that the Petitioner did not establish (1) that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions; and (2) that it will be a “United States employer” having an employer-employee relationship with the Beneficiary as an H-1B temporary employee.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director erred in determining (1) that the proffered position does not meet the requirements under 8 C.F.R. § 214.2(h)(4)(iii)(A); and (2) that it will not have a valid employer-employee relationship with the Beneficiary.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term “specialty occupation” as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

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The regulation at 8 C.F.R. § 214.2(h)(4)(ii) largely restates this statutory definition, but adds a non-exhaustive list of fields of endeavor. In addition, the regulations provide that the proffered position must meet one of the following criteria to qualify as a specialty occupation:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

8 C.F.R. § 214.2(h)(4)(iii)(A). U.S. Citizenship and Immigration Services (USCIS) has consistently interpreted the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proposed position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing “a degree requirement in a specific specialty” as “one that relates directly to the duties and responsibilities of a particular position”); *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000).

II. PROFFERED POSITION

In the H-1B petition, the Petitioner stated that the Beneficiary will serve as a “programmer analyst.” In addition, the Petitioner reported that the Beneficiary would work at [REDACTED] Minnesota [REDACTED].

In the letter of support, the Petitioner provided the following job duties for the position (bullet points added for clarity):¹

- Expand or modify systems to serve new purposes or improve work flow;
- Test, maintain, and monitor computer programs and systems, including coordinating the installation of computer programs and systems;
- Develop, document, and revise system design procedures, test procedures, and quality standards;

¹ The wording of the duties provided by the Petitioner for the proffered position in the letter of support is copied almost verbatim from the Occupational Information Network (O*NET) OnLine’s list of tasks associated with the occupation category “Computer Systems Analysts.”

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- Provide staff and users with assistance solving computer-related problems, such as malfunctions and program problems;
- Review and analyze computer printouts and performance indicators to locate code problems and correct errors by correcting codes;
- Consult with management to ensure agreement on system principles;
- Confer with clients regarding the nature of the information processing or computation needs a computer program is to address;
- Read manuals, periodicals, and technical reports to learn how to develop programs that meet staff and user requirements;
- Coordinate and link the computer systems within an organization to increase compatibility and information sharing; and
- Determine computer software or hardware needed to set or alter systems.

In the same letter, the Petitioner allocated its programmer analyst's time to various functions as: 10% on system design (gross design and modifications); 45% on system analysis; 15% on writing code and developing programs; 10% on creating and developing new code; 5% on downloading historical data; 10% on unit and system testing/debugging; and 5% generating management reporting and implementation and provision of technical software support.

According to the Petitioner, the position requires a bachelor's degree in computer science or engineering science, or its equivalent.

In response to the Director's request for evidence (RFE), the Petitioner provided two, new job descriptions for the position.² On appeal, the Petitioner submits a letter from [REDACTED] which states that the Beneficiary will perform the following duties:⁴

- Providing the SAP standard functionalities and best practices to [REDACTED] in SAP SRM (Supplier Relationship Management), SAP CLM (Contract Lifecycle Management).
- Identifying the FIT GAP analysis and configure the systems as per the business requirements.

² Notably, one of the job descriptions designates the Beneficiary's job title as "SAP Analyst." No explanation for this discrepancy was provided. Thus, we must question whether the information in this document is correctly attributed to the proffered position.

³ [REDACTED] does not indicate the Beneficiary's job title.

⁴ We observe that the job duties provided by [REDACTED] in her letter is significantly different from the Petitioner's job descriptions for the proffered position submitted with the initial petition and in response to the RFE. No explanation for the variances was provided. "[I]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence." *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* at 591-92.

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- Need to provide his technical expertise in the configurations of the systems as per the [REDACTED] business requirements.
- He is involved in testing activities which include create test plan for Functional Unit Testing, String Testing, Process Integration Testing.
- His is also involved in quality activities for STP (Source to pay) which involves in testing activities and creating the global scenario as per the [REDACTED] business process.

III. ANALYSIS

Upon review of the record in its totality and for the reasons set out below, we determine that the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation.⁵ Specifically, the record (1) does not describe the position's duties with sufficient detail; and (2) does not establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.⁶

A. First Criterion

We turn first to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position. To inform this inquiry, we recognize the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁷

On the labor condition application (LCA) submitted in support of the H-1B petition, the Petitioner designated the proffered position under the occupational category "Computer Systems Analysts" corresponding to the Standard Occupational Classification code 15-1121.⁸

⁵ Although some aspects of the regulatory criteria may overlap, we will address each of the criteria individually.

⁶ The Petitioner submitted documentation to support the H-1B petition, including evidence regarding the proffered position and its business operations. While we may not discuss every document submitted, we have reviewed and considered each one.

⁷ All of our references are to the 2016-2017 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/ooh/>. We do not, however, maintain that the *Handbook* is the exclusive source of relevant information. That is, the occupational category designated by the Petitioner is considered as an aspect in establishing the general tasks and responsibilities of a proffered position, and USCIS regularly reviews the *Handbook* on the duties and educational requirements of the wide variety of occupations that it addresses. To satisfy the first criterion, however, the burden of proof remains on the Petitioner to submit sufficient evidence to support a finding that its particular position would normally have a minimum, specialty degree requirement, or its equivalent, for entry.

⁸ The Petitioner classified the proffered position at a Level II wage. We will consider this selection in our analysis of the position. The "Prevailing Wage Determination Policy Guidance" issued by the DOL provides a description of the wage levels. A Level II wage rate is for a petitioner who expects its employee to perform moderately complex tasks that require limited judgment. U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://flcdatcenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf. A prevailing wage determination starts with an entry level wage and progresses to a higher wage level after considering the experience, education, and skill requirements of the Petitioner's job opportunity. *Id.*

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The *Handbook* subchapter entitled “How to Become a Computer Systems Analyst” states, in pertinent part: “A bachelor’s degree in a computer or information science field is common, although not always a requirement.”⁹

The *Handbook* does not state that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the proffered position. In fact, the *Handbook* specifically states that a bachelor’s degree is not always a requirement for computer systems analyst positions.

The Petitioner has not provided documentation from another probative source to substantiate its assertion regarding the minimum requirement for entry into this particular position. Thus, the Petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

B. Second Criterion

The second criterion presents two, alternative prongs: “The degree requirement is common to the industry in parallel positions among similar organizations *or, in the alternative*, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree[.]” 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) (emphasis added). The first prong casts its gaze upon the common industry practice, while the alternative prong narrows its focus to the Petitioner’s specific position.

1. First Prong

To satisfy this first prong of the second criterion, the Petitioner must establish that the “degree requirement” (i.e., a requirement of a bachelor’s or higher degree in a specific specialty, or its equivalent) is common to the industry in parallel positions among similar organizations.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry’s professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms “routinely employ and recruit only degreed individuals.” See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As previously discussed, the Petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports a standard industry-wide requirement for at least a bachelor’s degree in a specific specialty, or its equivalent. Thus, we incorporate by reference the

⁹ For additional information regarding the occupational category “Computer Systems Analysts,” see U.S. Dep’t of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2016-17 ed., Computer Systems Analysts, <http://www.bls.gov/ooh/computer-and-information-technology/print/computer-systems-analysts.htm> (last visited May 3, 2016).

previous discussion on the matter. Also, there are no submissions from the industry's professional association indicating that it has made a degree a minimum entry requirement. Furthermore, the Petitioner did not submit any letters or affidavits from similar firms or individuals in the Petitioner's industry attesting that such firms "routinely employ and recruit only degreed individuals."

In support of the assertion that the proffered position is a specialty occupation under this criterion of the regulations, the Petitioner submitted copies of job advertisements. However, upon review of the documents, we find that the Petitioner's reliance on the job announcements is misplaced.

On the Form I-129, the Petitioner stated that it is an information technology firm with 110 employees. The Petitioner also reported its gross annual income as \$30.8 million and its net annual income as \$45,552. The Petitioner designated its business operations under the North American Industry Classification System (NAICS) code 541512.¹⁰ This NAICS code is designated for "Computer Systems Design Services."¹¹

For the Petitioner to establish that an organization in its industry is also similar under this criterion of the regulations, it must demonstrate that the Petitioner and the organization share the same general characteristics. Without such information, evidence submitted by the Petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the Petitioner.

We will briefly note that, without more, the job postings do not appear to involve organizations similar to the Petitioner.¹² When determining whether the Petitioner and the organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). It is not sufficient for the Petitioner to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion.

We further observe that some of the advertisements do not appear to involve parallel positions. For example, some of the advertised positions appear to involve more senior positions than the proffered

¹⁰ According to the U.S. Census Bureau, NAICS is used to classify business establishments according to type of economic activity and, each establishment is classified to an industry according to the primary business activity taking place there. See <http://www.census.gov/eos/www/naics/> (last visited May 3, 2016).

¹¹ The U.S. Department of Commerce, Census Bureau website describes this NAICS by stating: "This U.S. industry comprises establishments primarily engaged in planning and designing computer systems that integrate computer hardware, software, and communication technologies. The hardware and software components of the system may be provided by this establishment or company as part of integrated services or may be provided by third parties or vendors. These establishments often install the system and train and support users of the system." U.S. Dep't of Commerce, U.S. Census Bureau, 2012 NAICS Definition, 541512 – Computer Systems Design Services, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited May 3, 2016).

¹² The postings include the following: (1) a company in the government and military industry; (2) a company the healthcare industry; and (3) a company in the manufacturing industry. It does not appear that the advertisements are from companies engaged primarily in information technology consulting.

position. More importantly, the Petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to those of the proffered position.

As the documentation does not establish that the Petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary.¹³ That is, not every deficit of every job posting has been addressed.

For the reasons discussed, the Petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

2. Second Prong

We will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the Petitioner shows that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent.

We reviewed the Petitioner's statements regarding the proffered position; however, in the appeal brief, the Petitioner does not assert that it satisfies this prong of the second criterion. Further, the Petitioner has not sufficiently developed relative complexity or uniqueness as an aspect of the proffered position. Thus, the Petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

C. Third Criterion

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position.

The Petitioner here did not submit information regarding employees who currently or previously held the position. The record lacks evidence that the Petitioner normally requires at least a bachelor's degree in a specific specialty, or its equivalent, directly related to the duties of the position. Therefore, the Petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

D. Fourth Criterion

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

¹³ The Petitioner did not provide any independent evidence of how representative the job postings are of the particular advertising employers' recruiting history for the type of job advertised. As the advertisements are only solicitations for hire, they are not evidence of the actual hiring practices of these employers.

On appeal, the Petitioner claims that the job duties of the position are so specialized and complex that a bachelor's degree in a specific specialty is required and that a "high school diploma does not prepare a candidate to provide SAP standard functionalities [*sic*] and best practices in SAP SRM, and SAP CLM." However, relative specialization and complexity have not been sufficiently developed by the Petitioner as an aspect of the proffered position. That is, the proposed duties have not been described with sufficient specificity to establish that they are more specialized and complex than other positions in the occupational category that are not usually associated with at least a bachelor's degree in a specific specialty, or its equivalent. Again, it appears that the Petitioner expects the Beneficiary to perform moderately complex tasks that require limited exercise of judgment (by its selection of a Level II wage on the LCA) compared to other positions within the same occupation.¹⁴

In addition, the Petitioner claims that the Beneficiary is well qualified for the position, and references his qualifications. However, the test to establish a position as a specialty occupation is not the education or experience of a proposed beneficiary, but whether the position itself requires at least a bachelor's degree in a specific specialty, or its equivalent. The Petitioner has not demonstrated in the record that its proffered position is one with duties sufficiently specialized and complex to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(*f*).

Because the Petitioner has not satisfied one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it has not demonstrated that the proffered position qualifies as a specialty occupation.

IV. EMPLOYER-EMPLOYEE

Finally, we will briefly address the issue of whether or not the Petitioner qualifies as an H-1B employer. The United States Supreme Court determined that where federal law fails to clearly define the term "employee," courts should conclude that the term was "intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992) (quoting *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). The Supreme Court stated:

"In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party

¹⁴ Nevertheless, a low wage-designation does not preclude a proffered position from classification as a specialty occupation, just as a high wage-designation does not definitively establish such a classification. In certain occupations (e.g., doctors or lawyers), a Level II position would still require a minimum of a bachelor's degree in a specific specialty, or its equivalent, for entry. Similarly, however, a Level IV wage-designation would not reflect that an occupation qualifies as a specialty occupation if that higher-level position does not have an entry requirement of at least a bachelor's degree in a specific specialty, or its equivalent. That is, a position's wage-level designation may be a relevant factor but is not itself conclusive evidence that a proffered position meets the requirements of section 214(i)(1) of the Act.

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has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party."

Id.; see also *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 445 (2003) (quoting *Darden*, 503 U.S. at 323). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968)).

As such, while social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control the Beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the Beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the Beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the Beneficiary's employer.

In this matter, the Petitioner stated that the Beneficiary would work offsite on a third party's premises, [REDACTED]. We have reviewed the information in the record in support of the Petitioner's assertion that it maintains an employer-employee relationship with the Beneficiary, including the letters submitted by [REDACTED] (the mid-vendor) and [REDACTED] (the end-client) on appeal. However, the letters from the end-client and the mid-vendor, as well as the statement of work, do not set out the individuals who will supervise the Beneficiary and assign him work while he is at [REDACTED].

The record lacks sufficient consistent, probative documentary evidence to support the Petitioner's claim that it will control the Beneficiary's actual work. Without full disclosure of all of the relevant factors, we are unable to properly assess whether the requisite employer-employee relationship will exist between the Petitioner and the Beneficiary. Therefore, the Director's decision is affirmed, and the appeal is dismissed for this additional reason.

V. CONCLUSIÓN

The burden is on the Petitioner to show eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of P-T-G-, Inc.*, ID# 16385 (AAO May 10, 2016)